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No. 77-424

In the Supreme Court of the United States

OCTOBER TERM, 1977

ERNEST TUCKER and GAIL ANN TUCKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1977. The petition for a writ of certiorari was filed on September 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly declined to recuse himself.

2. Whether the trial judge's remarks and examination of witnesses denied petitioner a fair trial.

3. Whether the trial court properly instructed the jury on aiding and abetting.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of 18 counts of mail fraud, in violation of 18 U.S.C. 1341 and 1342. Petitioner Ernest Tucker was sentenced to five years' imprisonment. Petitioner Gail Ann Tucker was sentenced to concurrent terms of six months' imprisonment on each of nine counts and was placed on probation for three years on the remaining counts.

The sufficiency of the evidence is not in dispute. In 1974 and 1975, petitioners, husband and wife, operating as Unique Ideas, Inc. (Tr. 496-497; Exhibit 1, p. 21)[1], obtained money from the sale of advertising materials, mailing lists, and other mailing materials (Tr. 770) by falsely representing that these materials would enable the purchasers to operate successfully a mail order business in fur novelties (Tr. 259-274, 332-354; Exhibit 51, p. 8). They sold these materials for amounts up to $575, designating the purchasers as business "agents" (Tr. 259-274, 332-354; Exhibit 51, pp. 8, 11). The latter were to solicit orders for the novelties from the public, keeping half of the money received and remitting the balance to petitioners, who would mail the novelties to the consumer (Exhibits 8, 51).

Representations in a brochure that petitioner Ernest Tucker had earned $35,000 in a single day (Exhibit 8, p. 30; Exhibit 51, p. 2) and that "E.K.", a purported user of petitioners' "proven easy money method," had made over $2,000 in his first month of operations were false (Tr. 478-493). In fact, an accountant had refused to sign the

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[1] "Tr." designates the trial transcript. "Exhibit" designates the government's exhibits at trial. "Tr." preceded by a pre-trial conference date designates the transcript of such date's conference.

statement concerning petitioner's earnings because of inaccuracies (Tr. 461-467, 471-473) and "E.K." had never used petitioners' scheme at all. In addition, the brochure listed bank references without permission or knowledge of the banks (Tr. 437-456, 556-561; Exhibit 3, p. 2; Exhibit 51, p. 2).

The vast majority of "agents" received no orders from the public for the fur novelties (Tr. 81, 185, 208, 232-233, 281). Others who ordered and paid for petitioners' sales material did not receive it (Tr. 217-220, 297-300, 320-321). Although petitioners shipped millions of advertisements intended for the public to the "agents," they purchased only a few hundred fur novelties from the manufacturer for resale to the public (Tr. 402-415, 418, 499-514, 802). In short, the evidence showed that petitioners had sold their victims sales material containing false representations of profits to be made from products that the petitioners never expected the public to buy.

ARGUMENT

1. Petitioners, relying on remarks made by the trial judge at a pretrial conference, claim that the judge should have recused himself. This contention was properly rejected by the courts below.

At that conference, the trial judge, who had sat in a related civil trial, stated that he was "curious" about petitioner Ernest Tucker going to trial, that it was his right to go to trial, but that the judge had heard "some of the evidence in this case already from the victims." At this point defense counsel stated that "the defendant has indicated to me that he would hope that I would make a motion * * * that this matter might be assigned to some other judge because of the fact that you had heard the previous trial and the previous evidence in this case." The

trial judge, after noting that such a motion should have been made earlier, stated "If there is some factual presentation which you wish to make short of the fact that I merely presided previously, then I expect that your client will say so in affidavit form." The judge also said that he had never seen either of the petitioners, that he had "no preconceived notions of anything other than what [he had] already written," and that each defendant would come before the court with the presumption of innocence (Pre-trial Conference of 11/1/76 Tr. 7-9). Petitioners never filed any ~~no~~ affidavit or motion for recusal.

At the outset, petitioners face a severe procedural obstacle, since they apparently abandoned their request for recusal when asked by the district court to submit it in affidavit form. No further request for recusal was forthcoming in any form, either by written affidavit as prescribed by the court or by oral renewal of the recusal request. This omission by petitioners is plainly fatal to any possible claim under 28 U.S.C. 144, which explicitly requires an affidavit of prejudice. While 28 U.S.C. (Supp. V) 455, on which petitioners primarily rely, contains no such express requirement—and it is therefore arguable that an oral motion would ordinarily suffice to raise a claim under that provision—petitioners' failure either to adhere to or object to the court's direction regarding the procedure for presenting the claim is fairly construed to reflect abandonment of the issue in the circumstances of this case.

In any event, petitioners were not entitled to the recusal of the district judge in this case on account of his prior handling of a related civil matter and his comments at the pre-trial conference. It has long been settled that a disqualifying bias ordinarily "must stem from an extrajudicial source" and not from the fact that a judge

presided at a related case or acquired information in his judicial capacity. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583; *United States* v. *Haldeman*, 559 F. 2d 31, 131-139 (C.A. D.C.), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933; *United States* v. *Partin*, 552 F. 2d 621, 636-639 (C.A. 5), certiorari denied, October 17, 1977 (No. 77-34). While Section 455 was amended and broadened several years ago, it remains true under the current statute that ordinarily only extrajudicial matters will supply a basis upon which "impartiality might reasonably be questioned" (28 U.S.C. (Supp. V) 455(a)) or "personal bias or prejudice" (28 U.S.C. (Supp. V) 455(b)(1)) might be inferred. See *United States* v. *Wolfson*, 558 F. 2d 59, 62 (C.A. 2).

The basis upon which petitioners question the district court's impartiality in this case is that the judge "formed adverse opinions as a consequence" of his involvement in the earlier case, mentioning particularly his reference to the persons allegedly defrauded by petitioners as "victims" (Pet. 19). Not only is it clear that this statement had no extrajudicial basis, but the indictment described a scheme in which people put up money on the basis of material misrepresentations and then lost their investments, *i.e.*, were victimized. While the allegations of the indictment were of course not proved at the time of the pre-trial conference, and the judge was perhaps slightly careless in failing to refer to the prospective prosecution witnesses as "alleged" victims, his statements cannot reasonably be construed to reflect bias, and petitioners fail to cite a single case suggesting that recusal is appropriate in factually similar circumstances.

2. Petitioners next contend (Pet. 21-35) that the trial judge's refusal to allow a continuance and his questioning of witnesses were an abuse of discretion and an exhibition of prejudice. These contentions are without merit.

a. On November 1, 1976, the court directed petitioner Gail Tucker to obtain separate counsel because her interests might conflict with those of her husband. On November 9, both petitioners filed affidavits waiving any prejudice that might result from such a conflict. The next day, the court again ordered that Mrs. Tucker obtain separate counsel, making it clear to counsel who then represented both petitioners that separate counsel should be informed that trial was to commence on November 29. On November 15, when a new attorney appeared for Mrs. Tucker, the court advised him that trial was scheduled to commence on November 29 and that it would consider an application for a continuance based on good cause after counsel began trial preparation (Pre-trial Conference of 11/15/76 Tr. 11). On November 23, when counsel asked for a continuance, the court found that his reasons were inadequate but said it would grant a continuance during the trial itself if necessary (Pre-trial Conference of 11/23/76 Tr. 10-13). At trial, which began on November 29, counsel for Mrs. Tucker did not request a continuance. In these circumstances, where counsel had at least two weeks to prepare for trial, the ruling of the trial court was neither an abuse of discretion, see *Ungar* v. *Sarafite*, 376 U.S. 575, 589-590, nor a reflection of bias.

Petitioner Ernest Tucker's claim (Pet. 27) that the court acted out of bias in refusing to grant him a continuance so that he might retain counsel of his choice also lacks substance. The stated purpose of his request for a continuance was to give his original counsel more time for preparation; at no time did petitioner state, as he does here, that he wished new counsel (Pre-trial Conference of 11/23/76 Tr. 23-24). Petitioner had had the same counsel for four months, and the court properly refused to countenance any further delay. *United States* v. *Calabro*, 467 F. 2d 973, 986 (C.A. 2), certiorari denied, 410 U.S.

926. See also *Allen* v. *United States*, C.A. 6, No. 76-2564, decided April 26, 1977, certiorari denied, October 3, 1977 (No. 76-6781).

b. The record does not support petitioners' charge that the trial judge became so involved in the questioning "that it became difficult to separate him from the prosecution" (Pet. 29). A full reading of the record reveals that the judge acted correctly to control the progress of the trial and clarify the evidence. Moreover, the judge permitted petitioner Ernest Tucker to interrupt the prosecutor's cross-examination in order to speak at length of his innocence directly to the jury (Tr. 876-893). The court exercised extreme patience as it repeatedly struck from the record petitioner Ernest Tucker's nonresponsive and evasive answers (Tr. 785, 799, 800, 802-803, 805, 807, 842, 844-845, 903, 909-910, 911, 913, 914, 920, 922, 924, 929, 932, 933, 940, 942, 952, 953, 958, 976, 986, 1003-1004). Although petitioners accuse the judge of asking "hostile" questions about petitioners' brochure sent to prospective "agents" (Pet. 30), the judge was merely trying to direct the jury's attention to a particular page so that they could follow petitioners' explanations (Tr. 783-797).

Finally, petitioners cite out of context (Pet. 31) a statement by the court to support an argument that the judge cut off petitioner Ernest Tucker's answer. Tucker had repeatedly refused to testify whether he had denied refunds to complaining customers (Tr. 932-933):

> THE WITNESS: Could I answer with an explanation?
>
> THE COURT: No, I know what your explanation is. We have heard it three times. Mr. Cutner is entitled to an answer to his question, and then appropriate arguments can be made to the jury. Did you or did

> you not give a refund on the mailing materials? Yes or no. If you can't answer the question yes or no, you may say, "I cannot answer that question yes or no."
>
> THE WITNESS: I cannot answer that question yes or no, without misleading the jury.

In sum, the record falls far short of demonstrating "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar* v. *Sarafite*, 376 U.S. 575, 588.

3. Petitioners argue (Pet. 36-38) that the trial judge failed to instruct the jury properly on the mental intent necessary to a conviction of aiding and abetting. However, the court delivered (Tr. 1135) substantially the same charge approved by this Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 619:[2]

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." [Citation omitted.]

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[2]Petitioners' claim (Pet. 38) that the charge delivered was "substantially the same" as the charge found to be erroneous in *United States* v. *Newman*, 490 F. 2d 139, 143 (C.A. 3), is without merit. There the charge failed to specify that, in order to convict, the jury must find that the defendant "participated in a substantive crime with the desire that the crime be accomplished" (emphasis omitted).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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